INDEX

444-026—71——1

CITATIONS

Cases:

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-88

S & E CONTRACTORS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (App. 45–97) is reported at 433 F. 2d 1373.

JURISDICTION

The decision of the Court of Claims was entered on November 30, 1970. The petition for a writ of certiorari was filed on February 26, 1971, and was granted on May 17, 1971, 402 U.S. 971. The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in a suit against the United States in the Court of Claims to recover the amount a contracting

agency found to be due to a government contractor in a proceeding under the standard disputes clause of the contract, the United States may challenge the decision of the agency under the standards embodied in the Wunderlich Act (41 U.S.C. 321–322).

STATUTES INVOLVED

The Wunderlich Act provides:

41 U.S.C. 321:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is so fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

41 U.S.C. 322:

> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

STATEMENT

Petitioner initiated this action in the Court of Claims against the United States to recover the amount which it claimed was due under a determination by the Atomic Energy Commission pursuant to

the disputes clause in a government contract. The Court of Claims held that the government was entitled to defend the suit by challenging the Commission's decision under the standards contained in the Wunderlich Act, 41 U.S.C. 321–322, and remanded the case to the court's commissioner for a consideration of the government's defenses on the merits (App. 45–61). That remand has been held in abeyance pending this Court's review of the decision of the Court of Claims.

The contract in question was entered into between petitioner and the United States, represented by the contracting officer, in August 1961 for the construction of a testing facility in Idaho (1R. 62). The contract disputes clause, standard in all government contracts entered into at that time,[1] provided:

> 6. *Disputes*
>
> (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or

[1] In 1964, the clause was amended in minor respects. See Pet. Br. 50–51, n. 8.

capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law [1R. 68].

While performing the contract, petitioner requested a number of extensions of time and equitable adjustments in its terms. Pursuant to the disputes clause, these claims were submitted to the Commission's contracting officer for the project, who rendered decisions on August 8 and November 8, 1962, denying a number of the claims and approving others (App. 1, 6). Petitioner appealed the adverse rulings to the Commission, which, pursuant to its then applicable regulations,[2] referred the appeal to a Commission hearing examiner.

After a 13 day hearing, the examiner issued his opinion in June 1963 sustaining eight of petitioner's

[2] See 10 C.F.R. (January 1, 1963) 2.1 *et seq.* As the regulations made clear, the *de novo* proceedings before the hearing examiner were adversary, with the contracting officer empowered to present evidence and argument in support of his rulings.

claims and remanding them to the contracting officer for negotiation of a final settlement (*ibid.*). As authorized by the Commission's regulations, the contracting officer filed a petition for review of the examiner's decision with the Commission, and on November 14, 1963, the Commission granted the petition with respect to four issues (*ibid.*)—an action which had the effect of affirming the hearing examiner's decision in favor of petitioner on the other issues.[3] On May 13, 1964, the Commission issued a decision on those four issues, sustaining in part the hearing examiner. The proceedings were remanded to the contracting officer for settlement in accordance with the decisions of the Commission and the hearing examiner (App. 2).[4]

On March 6, 1964, before the Commission's final decision, a certifying officer[5] of the Commission re-

[3] 10 C.F.R. (January 1, 1963) 2.760 provided that the hearing examiner's decision became the final decision of the Commission unless a party filed a petition for review within 20 days. If the petition for review were granted in whole or in part by the Commission, which it could do in its discretion (Section 2.762(d)), it could adopt, modify, or set aside the hearing examiner's decision and issue its own decision (Section 2.770). If the petition for review were denied, the hearing examiner's decision became the final action of the Commission (Section 2.762(e)).

[4] The Commission itself no longer considers contract disputes appeals, since in 1964 a Commission Board of Contract Appeals was established to rule on such appeals. See 10 C.F.R. (Jan. 1, 1966 Cum. Supp.) 3.1, *et seq.*

[5] Certifying officers are charged with the responsibility of certifying that vouchers submitted by contractors and other claimants are correct for payment. For a discussion of the historical and current responsibilities and liabilities of certifying and disbursing officers, see Cibinic and Lasken, *The Comptroller General and Government Contracts*, 38 G.W.L. Rev. 349, 358–362 (1970).

quested an opinion from the General Accounting Office ("GAO") with respect to several items ordered to be paid by the hearing examiner and not then under review by the Commission. In December 1966, the Comptroller General issued an opinion which reviewed in full the merits of the Commission's decisions granting petitioner's claims and found the decisions deficient under the standards of the Wunderlich Act. Accordingly, the Commission was advised not to pay the disputed claims.[6] 46 Comp. Gen. 441, 544. On March 27, 1967, the Commission, through its general manager, advised petitioner that petitioner had exhausted its administrative remedies and that the Commission would take no action on petitioner's claims inconsistent with the views expressed in the Comptroller General's opinion (App. 10).

Shortly after the notification from the Commission, petitioner commenced this action in the Court of Claims seeking the amount awarded in the Commission's 1964 decisions upholding its claims (App. 4–9). In its answer, the United States asserted as a defense that the administrative decisions were not final under the Wunderlich Act because they were not supported by substantial evidence and were erroneous as a matter of law (App. 14–16). On cross motions for summary judgment, a commissioner of the Court of Claims ruled in favor of petitioner, but without

[6] A chronology and description of the various consultations among GAO, petitioner and the contracting officer during the course of GAO's review of petitioner's claims is contained in the appendix to this brief ("GAO App.") setting forth the views of GAO on its authority to review agency contract disputes decisions. See GAO App., *infra*, pp. 42–44.

reaching the merits of the government's Wunderlich Act defense (App. 18–44). Focusing on the intervention of GAO, the commissioner concluded that GAO lacked the authority to review under the standards of the Wunderlich Act the Commission's decisions upholding petitioner's claims (App. 35–42). In his view, the Commission was not justified in acquiescing in GAO's opinion and, accordingly, the Commission's failure to implement its decisions favorable to petitioner was a breach of the disputes clause in petitioner's contract (App. 43).

The Court of Claims rejected the commissioner's ruling, holding—after a review of the legislative history of the Wunderlich Act (App. 49–55)—that the government was entitled under the statute to the same judicial review of the administrative determinations as were contractors. The court found the question whether GAO had authority to "review" administrative disputes decisions to be irrelevant; under the Wunderlich Act, it ruled, the only question before it was "how much finality attaches to the findings and holdings" of the Commission (App. 49). Furthermore, an agency's refusal to pay an award was considered to be of no consequence as the refusal "is not a breach of the disputes clause if the involved award is not supported by substantial evidence or otherwise is not entitled to finality under the Wunderlich Act" (*ibid.*). The court remanded the case to the commissioner for a consideration of the government's Wunderlich Act defenses (App. 61).

Three judges dissented (App. 61, 83). Two of them concluded that once the Commission had upheld peti-

tioner's claims, the controversy was extinguished and could not be revived either by an independent review by GAO or by the assertion of Wunderlich Act defenses by the Department of Justice in subsequent litigation (App. 61–82). The third dissenting judge followed the commissioner, arguing that the Commission violated the disputes clause of the contract by failing to implement its 1964 decisions (App. 97). The judge's own review of the legislative history of the Wunderlich Act led him to conclude that Congress did not intend GAO to exercise broad review of agency disputes decisions and, finally, that "the Wunderlich Act does not, and was never intended by Congress to, invest the federal agencies or their counsel with authority to challenge the decisions which the agencies themselves have made pursuant to a contractual provision" (App. 85–93, 97).

SUMMARY OF ARGUMENT

I

Prior to the enactment of the Wunderlich Act, 41 U.S.C. 321–322, decisions of contracting agencies were final and binding upon both parties in the absence of fraud. See *United States* v. *Moorman*, 338 U.S. 457; *United States* v. *Wunderlich*, 342 U.S. 98. While, under that state of the law, the disputes clause of government contracts provided an expeditious method of settling disputes—avoiding time-consuming and expensive resort to the courts—it did so to the point of giving finality to agency disputes decisions which were arbitrary or unsupported by substantial evidence. In passing the Wunderlich Act, supported by

government and industry spokesmen alike, Congress made the determination that whatever might be lost in expeditiously settling contract disputes was outweighed by the desirability of permitting judicial review to determine whether agency disputes decisions were "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." 41 U.S.C. 321.

Both the language and the legislative history of the Wunderlich Act indicate that the judicial review provided was to be equally available to the government and contractors alike. The statute provides that contract clauses limiting judicial review cannot be "pleaded in any suit"; no suggestion can be inferred that it is only the government that cannot plead such clauses. Numerous statements during all phases of the legislative history of the Act attested to the fact that agency disputes decisions frequently were adverse to the government and suggested that the rights of the government and contractors to review should be coextensive. Although a dispute did develop during the consideration of the proposed legislation over the role that the Government Accounting Office should play in the review of agency disputes decisions, that controversy did not overshadow the substantial support for a judicial review that would work both ways. The report of the House Judiciary Committee on the bill which was passed reflected that sentiment by noting that "everyone should have his day in court" and that "contracts should be mutually enforceable." H. Rep. No. 1380, 83d Cong., 2d Sess., p. 4. Finally, bills which would have expressly limited the availability of judi-

cial review to contractors were introduced, but not adopted by Congress.

II

If our interpretation of the Wunderlich Act is accepted, there remains the question whether the government, though the Department of Justice, is authorized to assert Wunderlich Act defenses in this case. Petitioner argues (Pet. Br. 37) that this question can only be resolved by determining whether GAO was acting within the scope of its authority in reviewing the Commission's decision on petitioner's contract claims. In our view, the plain language of the Wunderlich Act—prohibiting reliance on contract provisions to limit judicial review in "any suit" (41 U.S.C. 321)—makes it unnecessary to determine whether GAO's intervention was justified. Moreover, it was not GAO's intervention, but the decision of the Commission not to take further action on petitioner's claims, which precipitated petitioner's suit.

While it is our position that Wunderlich Act defenses can be asserted by the government in a suit brought by a contractor upon *any* refusal of a contracting agency to implement an agency disputes decision favorable to the contractor, we contend that, at least in this case, the withholding of action by the Commission was proper. In our view, once an agency has reason to believe that its decision may be vulnerable under the Wunderlich Act, it has the right—even though it might still believe its decision to be correct—to force judicial review of that decision. This right is an attribute of the government's right to judi-

cial review secured by the Wunderlich Act and thus cannot be denied by any provision in a government contract. But, as the disputes clause in petitioner's contract tracks the language of the Wunderlich Act, the Commission cannot be deemed to have violated the terms of its contract under any view.

Once a case is initiated in the Court of Claims by a contractor against the United States, the Department of Justice is directed by law to conduct the litigation on behalf of the government, 28 U.S.C. 516, 519, and this authority includes the responsibility for determining what defenses can and should be asserted to the contractor's claim. In the instant case, the Department and the Department alone had the final authority for determining whether Wunderlich Act defenses should be asserted in defending petitioner's suit. Only in this role as the government's attorney in court litigation, does the Department "review" the disputes decisions of contracting agencies.

III

Finally, we doubt that affirmance of the decision below will, as petitioner suggests, spell the end of the utility of the disputes process. In view of the number of challenges of agency disputes decisions by contractors, it is unlikely that the occasional assertion of the right to judicial review by the government will impose an undue burden on the Court of Claims or disrupt the normally expeditious resolution of disputes. Petitioner has pointed to no marked increase in litigation since the Court of Claims explicitly recognized some 6 years ago that the government has a

right to judicial review under the Wunderlich Act. See *C. J. Langenfelder & Son, Inc.* v. *United States*, 341 F. 2d 600.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY OF THE WUNDERLICH ACT MAKE CLEAR THAT THE GOVERNMENT AS WELL AS CONTRACTORS IS ENTITLED TO JUDICIAL REVIEW OF AGENCY DETERMINATIONS UNDER THE STANDARD DISPUTES CLAUSE OF GOVERNMENT CONTRACTS

The Wunderlich Act, 41 U.S.C. 321–322, was passed in response to this Court's decision in *United States* v. *Wunderlich*, 342 U.S. 98, holding that in the absence of fraud—defined as "conscious wrongdoing, an intention to cheat or be dishonest," 342 U.S. at 100—administrative decisions under the standard disputes clause in government contracts were final and not subject to judicial review. In the wake of that decision, industry and government spokesmen alike protested that the limited review permitted by the Court was too narrow and that corrective legislation was needed. In tracing the history of the legislation that emerged as the Wunderlich Act, petitioner (Pet. Br. 23–37) has concentrated primarily on the dispute over the role that the General Accounting Office ("GAO") should play in reviewing administrative contract decisions. In petitioner's view (see, *e.g.*, Pet. Br. 37), the government's right to assert the Wunderlich Act standards as a defense to petitioner's suit in the Court of Claims turns on the propriety of GAO's action in this case. In our view, however, the government's position in this case turns on an analysis of whether the Wunderlich Act sanctions challenges in court of

agency decisions by the government, irrespective of the role that GAO might play in any given case outside of the courts.

We begin with the language of the Act, which states that no provision of any contract entered into by the United States relating to the finality of a decision by an agency involving questions arising under the contract

> * * * shall be pleaded in *any* suit * * * as limiting judicial review of any such decision to cases where fraud * * * is alleged: *Provided however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence [emphasis supplied to word "any"; 41 U.S.C. 321].

Thus, no one may assert that the agency decision is final and conclusive and not susceptible to judicial review. Nothing in the wording of the Act suggests that its broad review provisions should be limited to decisions adverse to the contractor. See *C. J. Langenfelder & Son, Inc.* v. *United States,* 341 F. 2d 600, 607 (Ct. Cl.); *Acme Process Equipment Co.* v. *United States,* 347 F. 2d 538, 543 (Ct. Cl.); cf. *United States* v. *Utah Construction Co.,* 384 U.S. 394, 422.[7]

[7] This Court there stated (384 U.S. at 422):

> In the present case the [Atomic Energy Commission Contract Appeals] Board was acting in a judicial capacity when it considered the Pier Drilling and Shield Window claims, the factual disputes were clearly relevant to issues properly before it, and *both parties had* a full and fair opportunity to argue their version of the facts *and an opportunity to seek court review of* any adverse findings * * *. [Emphasis added].

The legislative history of the Act confirms that the broad provisions of the statute were intended to prevent either party to a government contract from relying on this disputes clause to cut off judicial review of agency decisions on contract disputes. At the Senate hearings held on S. 2487, one of the initial bills introduced in the 82d Congress to modify the *Wunderlich* decision, numerous witnesses pointed out that the government as well as a contractor could be adversely affected by agency decisions and that judicial review should be available to both parties. Frank L. Yates, Assistant Comptroller General, appeared to object to the omission of any reference to the General Accounting Office in the bill on the ground that the omission would preclude GAO from questioning the propriety or legality of payments made to a contractor as a result of an arbitrary or grossly erroneous decision of an agency. Hearings on S. 2487 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess., p. 10. While Mr. Yates' specific concern was with the role of GAO in the disputes process, he noted in more general terms that the *Wunderlich* decision "works both ways," that administrative officials not infrequently make decisions adverse to the government and that the interests of the government are just as involved in the proposed legislation as the interests of contractors (*id.* at 9, 12). In his view, the "rights of contractors and the Government to review or appeal should be coextensive" (*id.* at 11). By letters to the chairmen of both the Senate and House Committees on the Judiciary, the Comptroller General also noted that deciding agency

officials can make arbitrary determinations in favor of contractors as readily as in favor of the government (*id.* at 6, 117).

Industry spokesmen as well testified at the Senate hearings that judicial review should be made available to government and contractors alike. The Associated General Contractors of America, representing more than 6,000 general contractors (*id.* at 22), went on record for the proposition that (*id.* at 29):

> any decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based.

While at one point, the organization's general counsel, John C. Hayes, recommended legislation which would empower the Court of Claims to enter judgment against the United States on any claim on which a contractor shall seek review of an agency decision (*id.* at 30), he later made clear that the judicial review he was advocating should "cut both ways" for the benefit of both contractors and the government (*id.* at 31).[8] Similarly, Gardiner Johnson, an attorney specializing in the representation of contractors, testified that both the government and the contractor should have the right to judicial review of agency decisions (*id.* at 83–84).

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[8] Mr. Hayes concluded his testimony by saying (id. at 32):

> [W]e want to take the position of being absolutely fair in urging legislation that will protect the rights of both Government and contractor. That is all we want, a judicial review, that we think every citizen is entitled to.

Following the hearings, the Senate Judiciary Committee reported out a substantially amended bill, which specifically empowered GAO as well as the courts to review agency decisions. See S. Rep. 1670, 82d Cong., 2d Sess., p. 1. The committee report accompanying the bill noted the adverse impact that the *Wunderlich* decision had had on contractors and stated (*id.* at 2):

> It must also be borne in mind that to the same extent this decision would operate to the disadvantage of an aggrieved contractor, it would also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the Government interest in the claim.
>
> * * * * *
>
> S. 2487 will have the effect of permitting review in the General Accounting Office or a court with respect to *any* decision of a contracting officer or a head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. * * *

The report also pointed out that the specific reference to GAO in the bill was

> * * * not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but

> simply to recognize the jurisdiction which the General Accounting Office already has [*id.* at 2–3].

While S. 2487, as amended, was passed by the Senate, no action was taken by the House before the 82d Congress adjourned; as a consequence, the amended bill was reintroduced in the Senate at the outset of the 83d Congress as S. 24[9] and passed by the Senate. That the Senate viewed this legislation as providing for judicial review for both the government and contractors alike was further made clear by Senator McCarran, one of the bill's sponsors, who stated on the floor of the Senate on separate occasions during the consideration of the bill:

> Senators who have looked into this matter know that the [*Wunderlich*] decision cuts two ways. It can hurt the Government badly, as well as doing an injustice to the contractors. In a recent case * * * [t]he contractor interposed a defense based upon the Supreme Court decision in the Wunderlich case * * *. The * * * result was a failure of recovery on behalf of the Government [99 Cong. Rec. 4573].
>
> Obviously [*Wunderlich*] can operate greatly to the disadvantage of contractors, in cases where there has been a gross mistake against the interest of the contractor. It is equally true that, to the same extent, this interpretation can operate to the disadvantage of the Government in cases where there has been a gross mistake detrimental to the Government interest * * * [99 Cong. Rec. 6170].

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[9] In reporting out S. 24, the Senate Judiciary Committee reissued with only formal changes its earlier report on S. 2487 as S. Rep. No. 32, 83d Cong., 1st Sess.

Review of the subsequent history of S. 24 shows that the further amendments to the bill—specifically the deletion of the reference to GAO—were not intended to alter the general proposition of mutuality with respect to the judicial review provisions.

Following the Senate's passage of S. 24, the House conducted hearings on July 30, 1953, and January 21 and 22, 1954, on S. 24 (identical to H.R. 1839) and related bills. See Hearings on H.R 1839, S. 24, H.R. 3634 and H.R. 6946 before Subcommittee No. 1 of the House Committee on the Judiciary, 83d Cong., 1st and 2d Sess. While a good deal of the testimony at these hearings focused on the consequences of referring to GAO in the legislation—although the opposition to the reference was not, as petitioner asserts (Pet. Br. 28), virtually unanimous (see *id.* at 5, 18, 33, 39)—several witnesses again stressed that the *Wunderlich* decision worked against the government as well as against contractors. Thus, at the first day of hearings in July 1953, the president of a contracting company urged passage of the proposed legislation to protect both the government and contractors (*id.* at 4), as did an attorney who represents government contractors (*id.* at 12). Another attorney, Alan Johnstone, commented that the bill—

> * * * substitutes for executive justice judicial justice * * *. [T]his bill would throw wide the portals of the courts of justice to anyone, including the Government, which has a grievance * * * [*id.* at 19].

Before resumption of the House Hearings in January 1954, the Comptroller General on December 30,

1953 wrote the Chairman of the House Judiciary Committee to propose certain amendments to S. 24 (*id.* at 135–137). The letter noted that there was considerable opposition to the reference to GAO in the proposed legislation and noted further that a rider to a Defense Department appropriation act providing for an appeal by a contractor to the Court of Claims from disputes decisions was inadequate, *inter alia,* because it "does not protect the Government where the administrative decision may be prejudicial to the interests of the Government" (*id.* at 135–136). To meet the opposition while at the same time protecting the right of the government to judicial review, the Comptroller General proposed an amendment to S. 24 which deleted any reference to GAO (*id.* at 136). With minor changes, this proposal eventually emerged as the Wunderlich Act. With respect to the future role of GAO in contract disputes, the letter concluded that the proposed amended legislation "will accomplish what we have been striving for all along and will place the General Accounting Office in precisely the same situation it was in before the decisions in the *Wunderlich* and [*United States* v. *Moorman,* 338 U.S. 457] cases" (*ibid.*).

With the resumption of the hearings, GAO's general counsel testified that both the Comptroller General's proposed amended bill as well as the earlier version of S. 24 would ensure review of decisions of administrative officials by GAO and the courts under the specified standards (*id.* at 38–39). He also stressed that agency decisions can work against the government and the taxpayer and that the rights of con-

tractors and the government to review or appeal should be coextensive (*id.* at 39.) Similar views on the need to protect the interests of the government were expressed by an associate general counsel of the General Services Administration and by Congressman Edwin E. Willis of Louisiana, both appearing as witnesses before the subcommittee (*id.* at 33, 57–59). Mr. Willis, when asked who in the government might decide to seek review, referred to the Department of Justice and the Department of Defense, as well as GAO (*id.* at 59). Finally, as at the Senate Hearings (see p. 15, *supra*), the Associated General Contractors of America went on record as supporting legislation that would grant both the government and contractors the right of judicial review of disputes decisions (*id.* at 63–64, 72, 75).

As petitioner has pointed out (Pet. Br. 28–33), a number of witnesses at the House Hearings representing either the Defense Department or private concerns urged that GAO should not be permitted to review administrative disputes decisions (see *id.* at 54–55, 92–93, 97, 103, 105–106, 116, 132). While some of the testimony of these witnesses did indeed focus on the effect that potential GAO intervention would have on the finality of administrative disputes decisions or the ability of contractors to secure financing on their contracts, some of the witnesses appeared to want no more than to confine review of such decisions to the courts. Leonard Niederlehner, Deputy General Counsel of the Defense Department, testified, for example, that if legislation were passed to limit the finality of agency disputes decisions, it should limit

review to courts of competent jurisdiction (*id.* at 55). That the amended bill omitting any reference to GAO which essentially became the Wunderlich Act did not by its terms foreclose the government from judicial review of agency disputes decisions, was expressly acknowledged by Franklin Schultz, an attorney opposed to giving the government any right to judicial review. During the course of his testimony, the following colloquy took place (*id.* at 110):

> [Mr. SCHULTZ.] As I read the language of the Comptroller General's bill it does not say specifically that an appeal can be taken by an aggrieved contractor. It says that
>
> > no provision of any contract entered into by the United States relating to the finality or conclusiveness of any decision of the head of any department or his duly authorized representative or board in a dispute involving a question arising under such contract shall be pleaded—
>
> it does not say by whom—
>
> > as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged.
>
> And it says:
>
> > *Provided, however,* That any such decision shall be final and conclusive—
>
> but it does not say against whom—
>
> > unless the same is found to be fraudulent * * *.
>
> Mr. HYDE. Does that not necessarily include both parties?
>
> Mr. SCHULTZ. Yes, and that is exactly my point. * * *

Mr. Schultz' concern was that, unless the legislative history of the bill were clear to the contrary, the bill would permit GAO to argue that it had the authority to upset agency decisions (*ibid.*). His testimony did not refer to the fact that the agency itself or the Department of Justice might be involved in the government's decision to force judicial review.

Following conclusion of the hearings, the House Judiciary Committee reported out and recommended passage of the amended S. 24. The following passage from the accompanying report leaves little doubt that the review sanctioned by the Act was to be available to both the government and contractors (H. Rep. No. 1380, 83d Cong., 2d Sess., p. 4):

> After extensive hearings it has been concluded that it is neither to the interests of the Government nor to the interests of any of the industry groups that are engaged in the performance of Government contracts to repose in Government officials such unbridled power of finally determining either disputed questions of law or disputed questions of fact arising under Government contracts, nor is the situation presently created by the Wunderlich decision consonant with tradition that everyone should have his day in court and that contracts should be mutually enforceable.

The amended bill was passed in the House and the Senate and was signed into law on May 11, 1954. 100 Cong. Rec. 5510, 5717, 6326.[10]

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[10] Some of the proposed bills before Congress to overcome the *Wunderlich* decision would have specifically limited the right to seek judicial review of agency decisions to contractors. H.R. 6301, for example, introduced in the 82d Congress, Sec-

In sum, we submit that the legislative history of the Wunderlich Act shows that Congress was repeatedly made aware of the adverse impact that agency disputes decisions could have on the government and the need to protect the government's interests as well as the interests of contractors. While a substantial dispute did develop over the role that GAO should play in the disputes process and while there are conflicting statements in the legislative history on the effect that the omission of any reference to GAO has on the authority of that entity,[11] the right of the government to review of agency disputes decisions *in the courts* was recognized by the statute and does not depend on the resolution of the conflict over GAO's authority.

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ond Session, provided for judicial review only in those instances "in which the contractor shall seek to set aside a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States * * * " (pp. 1–2). The American Bar Association proposed legislation which limited the right of judicial review to the contractor (House Hearings, p. 91). Similarly, representatives of a number of private contractors proposed legislation which would preclude the United States from asserting as a defense in court the finality of the administrative decision, but would not prevent the contractor from urging finality (Senate Hearings, pp. 107, 108). Finally, the Shipbuilders Council of America proposed legislation which would bar inclusion of a clause in any contract which would limit the contractor's right to judicial review of any questions arising under the contract (Senate Hearings, p. 132). That none of these proposals was adopted or incorporated into the bill which was passed further supports the conclusion that the Wunderlich Act permits the government to seek judicial review of agency disputes decisions.

[11] For the views of GAO on its authority, see GAO App., *infra*, pp. 41–50.

II. THE GOVERNMENT, THROUGH THE DEPARTMENT OF JUSTICE, IS AUTHORIZED TO ASSERT WUNDERLICH ACT DEFENSES IN THIS CASE

As we have argued in Part I, the Wunderlich Act forecloses petitioner's reliance on the disputes clause of its contract to bar review by the Court of Claims of the Atomic Energy Commission's decision on petitioner's contract claims. Petitioner, however, asserts—in addition to its claim that the statute gives the government no right to judicial review—that GAO had no authority to intervene in the administrative disputes process, that the Commission's decision not to take action leading to the payment of petitioner's claim thus violated the terms of the contract, and that the Department of Justice had no authority to raise the Wunderlich Act defenses in this litigation. In our view, none of these assertions bars the government's right to judicial review of agency decisions secured by the Act.

A. THE COURT NEED NOT DECIDE WHETHER GAO'S INTERVENTION IN THIS CASE WAS PROPER

A major portion of petitioner's brief is devoted to the argument that GAO has no authority under either the Wunderlich Act or any other statute to intervene in the administrative disputes process (Pet. Br. 21–49) and that, even if it did, the disputes clause in petitioner's contract foreclosed exercise of that authority in this case (Pet. Br. 53–56). In petitioner's view, that issue must be resolved as GAO's intervention precipitated this suit and only if such intervention were "within the contemplation of the

Wunderlich Act could the Court of Claims have concluded, as it did, that the failure to pay petitioner was not a breach of contract" (Pet. Br. 37). We believe this view is unsound for two reasons.

First, and most fundamentally, the factors that precipitated petitioner's suit in the Court of Claims are irrelevant to the government's right to assert Wunderlich Act defenses. The critical facts are that, for whatever reason, the government declined to pay petitioner's claims, and that petitioner then brought suit on those claims. The Court of Claims has recognized that in those circumstances the government may litigate the validity of the agency disputes decision. See, *C. J. Langenfelder & Son, Inc.* v. *United States*, 341 F. 2d 600; *Acme Process Equipment Co.* v. *United States*, 347 F. 2d 538, 543–544 (Ct. Cl.); *Northrop Aircraft, Inc.* v. *United States*, 127 F. Supp. 597 (Ct. Cl.).

In *Langenfelder*, a contracting officer, dissatisfied with a disputes decision of the Administrator of the Federal Aviation Agency, with the apparent cooperation of the FAA's General Counsel, had persuaded the Administrator to reconsider the decision and refer the case back to the agency's contract appeals panel for a full rehearing. In the subsequent suit by the contractor based on the Administrator's initial decision, the Court of Claims held that the request for reconsideration by the contracting officer was untimely. 341 F. 2d at 604–605. Notwithstanding the fact that the suit had thus been occasioned by the bald refusal of the contracting officer to implement the administrator's decision, the court went on to consider the

government's Wunderlich Act defenses—which it rejected on the merits (*id.* at 606–612).

The second weakness in petitioner's assertion that the legality of GAO's action in this case must be resolved is that it was not the intervention of GAO that directly triggered petitioner's suit. Rather, it was the decision of the Commission not to pay petitioner's claims.[12] GAO merely advised the Commission that in GAO's opinion petitioner had no valid claims against the United States and, in effect, recommended that the Commission not pay petitioner. But GAO's recommendation could not and did not overrule the Commission's decision; the recommendation was not binding either on petitioner, the Commission, or the Court of Claims. Since the Commission could have ignored the GAO opinion and proceeded to final settlement of petitioner's claims, the only issue is whether the Commission's refusal to pay the claims may be judicially reviewed in the contractor's Court-of-Claims suit on the claims. Accordingly, we deem it

[12] Petitioner, if it had so chosen, could have initiated an action in the Court of Claims upon the Commission's order of November 14, 1963, directing payment of certain sums to petitioner, without waiting for completion of GAO's review of the claims. A GAO decision on pending contract claims is not a prerequisite to suit in the Court of Claims. See *Iran National Airlines Corp.* v. *United States*, 360 F. 2d 640 (Ct. Cl.); cf. *St. Louis, B. & M. Ry.* v. *United States*, 268 U.S. 169, 174. Moreover, with respect to the claims remanded to the contracting officer for further action, petitioner could have brought suit, without exhausting any further administrative remedies, if it became apparent that the officer was unreasonably delaying complying with the terms of the remand. See *C. J. Langenfelder & Son, Inc.* v. *United States*, *supra*, 341 F. 2d at 605.

unnecessary to discuss here the propriety of GAO's action.[13]

B. THE COMMISSION'S DECISION TO TAKE NO FURTHER ACTION ON PETITIONER'S CLAIMS WAS AUTHORIZED BY THE WUNDERLICH ACT AND DID NOT VIOLATE THE TERMS OF THE AGENCY'S CONTRACT WITH PETITIONER

As we have noted, our basic position is that upon *any* refusal to implement an agency disputes decision, the government is entitled in a subsequent suit brought by the contractor in the Court of Claims to raise Wunderlich Act defenses. We argue here that even if the Commission's decision not to pay petitioner's claims must be scrutinized as a prerequisite to the government's right to raise the statutory defenses, the decision was authorized by the Wunderlich Act and the contract with petitioner.

In the usual dispute proceeding, the final administrative determination of a contract dispute will be made by an agency board of contract appeals and the agency head—either on his own or after consultation with GAO or the Department of Justice—will decide

[13] For GAO's views on the legality and effect of its consideration of petitioner's contract claims, see GAO App., *infra*, pp. 41–50. For a general discussion of the role of GAO in contract matters, see Cibinic and Lasken, *The Comptroller General and Government Contracts*, 38 G.W.L. Rev. 349 (1970); Shnitzer, *Changing Concepts in Government Procurement—The Role and Influence of the Comptroller General on Contracting Officer's Operations*, 23 Fed. B.J. 90 (1963); Birnbaum, *Government Contracts: The Role of the Comptroller General*, 42 A.B.A.J. 433, 491–492 (1956); see also 42 Op. Atty. Gen. No. 37 (September 22, 1969) (holding Comptroller General's ruling that the "Philadelphia Plan" for employment of minority employees on government contracts is invalid, to be non-binding upon contracting officers). Cf. *Miguel* v. *McCarl*, 291 U.S. 442.

whether to accept the board's decision (if in favor of the contractor) and authorize payment of the claim or withhold payment and force judicial review of the decision. While the boards are technically a part of the agency, the quasi-judicial functions are exercised independently—free from the direction and control of any other administrative authority. We agree with the analysis of the Court of Claims (App. 57–59) that their independence is enhanced, rather than diminished, by the fact that their decisions in favor of contractors can be subjected to judicial review.[14]

In the present case, which arose prior to the Commission's establishment of a board of contract appeals (see n. 4. *supra*), the Commission itself made the final administrative decision on petitioner's contract claims. But that fact, we submit, should not foreclose the Commission from deciding at a later date to withhold payment in order that there may be court review of its decision. Here, factors were brought to the Commission's attention by GAO which, at the least, cast some doubt on the soundness of the agency's decision. Even if the Commission viewed GAO's intervention as unauthorized and remained of the view that its decision in favor of petitioner was correct, it nevertheless may have concluded that sufficient doubts had

[14] Petitioner's contention (Pet. Br. 68–72) that regulations authorizing boards of contract appeals to decide disputes clause appeals as "fully and finally" as their respective agency heads foreclose the agencies from seeking judicial review of the decision is without merit. Properly construed, the regulations merely establish that the boards have the final decision making authority *within the agencies*; the regulations do not define the rights of the parties to review of agency decisions.

been raised to warrant court review under the Wunderlich Act standards before payment was made. In our view, the Commission has the right to withhold payment on contract claims whenever it concludes that significant doubts exist as to the validity of its decision under the prescribed standards or merely that the importance of the factual or legal issues raised warrant presentation to a court.[15]

If we are correct in our submission that an agency may bring about judicial review of its decision by withholding payment, then under the Wunderlich Act no provision of any contract can be pleaded in the resultant suit brought by the contractor as limiting that right. Thus, if the disputes clause in petitioner's contract were construed to prevent the Commission from withholding payment, the clause would be inconsistent

[15] The brief of the American Bar Association as *amicus curiae* notes at pp. 15–16 that under the disputes clause of petitioner's contract a decision of a contracting officer, if not appealed by a contractor, is final and that the Wunderlich Act does not disturb that finality. It is asserted that the government's position in this case thus leads to the anomaly of according greater finality to the decisions of contracting officers than decisions of agency heads. The contracting officer, however, primarily represents the interests of the government, having the authority to enter into binding contracts and modification or settlement agreements on behalf of the government. See 41 C.F.R. (January 1, 1970) 9–1.450; *United States* v. *Corliss Steam-Engine Co.*, 91 U.S. 321. Thus, in the absence of fraud, it can reasonably be expected that his decisions on contract disputes will adequately protect the interests of the United States. Decisions of quasi-judicial boards of contract appeals or agency heads, on the other hand, are more likely to be adverse to the interests of the government. See, *e.g.*, House Hearings, p. 54 (roughly 50 percent of the cases heard by the Army Board of Contract Appeals from 1942–1950 were decided in favor of the contractor).

with the Wunderlich Act. As this Court noted in *United States* v. *Utah Construction Co.*, 384 U.S. 394, 413, "coverage of the disputes clause is a matter susceptible of contractual determination * * * subject to the limitations on finality imposed by the Wunderlich Act." In fact, the contract's disputes clause is not inconsistent with the Wunderlich Act as its controlling language—providing that a disputes decision of the Commission "shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence" [16]—embodies the same finality standards as the statute. Thus, the Commission's failure to implement its decision upholding petitioner's contract claims did not result in a breach of its contract with petitioner.

In an attempt to show that the government breached the contract, petitioner asserts that even if the Wunderlich Act permits both parties to the contract to obtain *judicial review* of disputes decisions, nothing in the contract permits attack of such decisions by either GAO or the Department of Justice, neither of which was a party to the contract (Pet. Br. 50–52). With respect to the identity of the "parties," the contract was entered into between petitioner and the United States, represented by the contracting officer (1R. 62). The Commission, GAO and the Department are all integral parts of the United States, cf. *Small Business Administration* v. *McClellan*, 364 U.S. 446,

[16] The full text of the disputes clause is set forth at pp. 3–4, *supra*.

448–450, and thus are "parties" to petitioner's contract to the extent that they are charged by law with the responsibility of protecting the government's interests in that contract. As we have explained (see pp. 24–27, *infra*), the authority of GAO to intervene in this case need not be resolved as it was not GAO's decision, but the decision of the Commission in withholding further action, which forced petitioner into court. As we show at pages 32–36, *infra*, the Department of Justice is fully authorized to impose Wunderlich Act defenses in suits brought by contractors on the basis of agency disputes decisions.

Petitioner further asserts, however, that even if as a general matter either GAO or the Department of Justice is authorized to intervene in contract disputes determinations, the contract forecloses intervention here. Primary reliance is placed on this Court's pre-Wunderlich Act holding in *United States* v. *Mason & Hanger Co.*, 260 U.S. 323, that a contract payment authorized by a contracting officer and accepted by the agency, which decision was "final" under the terms of the contract, was binding on the Comptroller of the Treasury. The contract in that case, however, explicitly provided that the agency action was final and such a provision was not prohibited by statute. Under ordinary principles of contract law, the government—including the Comptroller of the Treasury—was bound by the terms of its contract. In the present case, however, the disputes clause did not, and could not under the Wunderlich Act, bestow finality upon the Commission's disputes decision. *Mason & Hanger* is thus not in point and does not bar either GAO or the De-

partment of Justice from meeting their responsibilities—whatever they may be—of protecting the interests of the government under the contract.

C. IN LITIGATION AGAINST THE UNITED STATES, THE DEPARTMENT OF JUSTICE IS AUTHORIZED TO RAISE ANY DEFENSE PERMITTED BY LAW.

Judge Skelton, dissenting below, accused the Department of Justice of seeking to become a "super reviewing agency," with power to overrule the decisions of other executive departments or agencies (App. 72–73). He could find no authority for the Department to "*review* the AEC decision in any manner different from a review by any other lawyer of his client's case to familiarize himself with the issues involved in preparation for a court trial" (App. 78). Petitioner is in "complete agreement" with these views (Pet. Br. 53). In our view, however, the Department's action in asserting Wunderlich Act defenses in this case did not exceed its traditional authority to conduct government litigation—an authority which differs markedly from the authority normally granted an attorney by a private litigant. Whatever "review" was made of the Commission's decision in the sense Judge Skelton used that term was made not by the Department of Justice but will eventually be made by the Court of Claims, in the traditional exercise of its judicial function.

Under 28 U.S.C. 516 and 519,[17] the conduct of liti-

[17] 28 U.S.C. 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Depart-

gation in which the United States or a federal agency is a party is entrusted to the Department of Justice, under the supervision of the Attorney General. The statutes do not subject the authority thus conferred to the ultimate control of the agency whose decision may be the cause of the litigation. Thus, unlike attorneys representing private clients, the Attorney General cannot be replaced by his "client" for failure to follow instructions, but has the full responsibility to determine and defend the government's interest. See *Castell* v. *United States*, 98 F. 2d 88, 91 (C.A. 2), certiorari denied, 305 U.S. 652 (Attorney General had authority to enter into a stipulation settling and dismissing an income tax appeal without the approval of the Commissioner of Internal Revenue or the Secretary of the Treasury). Although not applicable to the Atomic Energy Commission, a 1933 Executive Order reorganizing certain executive agencies and transferring their litigation authority to the Department of Justice illustrates the breadth of the Department's control of government litigation. See Exec. Order No. 6166, set forth in the United States Code following 5 U.S.C. 901. Section 5 of that order states in part:

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ment of Justice, under the direction of the Attorney General.

28 U.S.C. 519 provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Indeed, in the Judicial Review Act of 1950, now contained in 28 U.S.C. 2341, *et seq.*, Congress explicitly again recognized the broad authority of the Attorney General to conduct all government litigation. In providing for judicial review of orders of various agencies, including the Atomic Energy Commission, Congress provided that "The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter" (28 U.S.C. 2348). It created an exception to this broad general authority of the Attorney General by providing that the agency can appear as a party and as of right in the review proceeding by its own counsel, and that the Attorney General may not "dispose of or discontinue the proceeding to review over the objection of any party * * *" (*ibid.*).

In the contract disputes area, once a contractor initiates litigation against the United States on the basis of a favorable agency disputes decision (as here), the Department of Justice does not automatically defend the agency decision, but undertakes to determine whether that decision is consistent with

Wunderlich Act standards.[18] If the decision is vulnerable under those standards, then a valid defense exists to the contractor's suit. That the agency and the Department might differ in their evaluations of the correctness of the decision does not diminish the responsibility of the Department to determine the position the United States will take in the lawsuit. Only to enable it to make that determination, does the Department of Justice "review" agency disputes decisions. No attempt is made to interfere in the disputes process prior to litigation in the Court of Claims.[19]

Within these limits of authority, the Attorney General in 1969 suggested an appropriate procedure for reviewing agency disputes decisions favorable to contractors to determine which decisions should be sub-

[18] To enable the Department of Justice to make that determination and otherwise defend the suit, the contracting agency is obligated to prepare for the Department a detailed report containing all pertinent information which the Department might need to conduct the litigation. 28 U.S.C. 520.

[19] The power of the United States, acting through the Department of Justice, to recover funds wrongfully paid out, either by an affirmative action (see *United States* v. *Wurts*, 303 U.S. 414; *Wisconsin Central Railroad* v. *United States*, 164 U.S. 190; *United States* v. *Bank of the Metropolis*, 40 U.S. 377; *J. W. Bateson, Co.* v. *United States*, 308 F. 2d 510 (C.A. 5)) or through set off or counterclaim (see *United States* v. *Birchard*, 125 U.S. 176; *Acme Process Equipment Co.* v. *United States*, 347 F. 2d 538, 551–552 (Ct. Cl.); *Flippin Materials Co.* v. *United States* 312 F. 2d 408 (Ct. Cl.)) is not directly involved here. There is no need, therefore, to reach the question whether the Department of Justice could initiate a suit to recover funds paid by an agency on the basis of a contract disputes decision which the Department or GAO felt was deficient under Wunderlich Act standards.

jected to judicial review (42 Op. Atty. Gen. No. 33 (January 16, 1969)). The Attorney General suggested that contracting agencies should bring to the attention of the Department of Justice appeals board decisions which the agencies felt warranted litigation in accordance with the Wunderlich Act. Thereupon, the Department would make an "independent appraisal" whether suit could properly be litigated under the Act (*id.* at 10). Far from asserting a "super reviewing" authority over agency decisions, the Attorney General's opinion merely suggests a procedure whereby an agency can obtain an advance opinion on how the Department of Justice would litigate a disputes case should the agency withhold payment of an appeals board award in order to force a contractor into court. The *decision* would be made by the court, judicially.

To recapitulate, the Department of Justice "reviews" agency contract disputes decisions only upon initiation of a lawsuit in the Court of Claims by a contractor or upon reference of an appeals board decision for an appraisal of whether the decision is vulnerable under Wunderlich Act standards. The reviewing function in either case is fully consistent with, and an integral part of, the Department's responsibility to conduct government litigation. In the instant case, once petitioner initiated the action in the Court of Claims, the authority to decide whether to assert Wunderlich Act defenses rested with the Department of Justice and with it alone. Whether those defenses, if asserted, were valid was for judicial decision by the court, not by the Department of Justice.

III. THE GOVERNMENT'S OCCASIONAL CHALLENGE OF AGENCY DISPUTES DECISIONS WILL NEITHER OVERBURDEN THE COURTS NOR DESTROY THE UTILITY OF THE DISPUTES PROCESS

Petitioner asserts (Pet. Br. 18) that affirmance of the decision below will impose a needless and unwarranted burden upon administrative agencies and the courts and will thus bring an end to the disputes process, the chief purpose of which is to resolve contract disputes expeditiously (Pet. Br. 16). In our view, petitioner's fears are unjustified.

As an initial matter, the responsibility for determining whether judicial review of disputes decisions is preferable to absolute finality at the agency level rests with Congress, rather than the courts. The legislative history of the Wunderlich Act shows that the prevalent opinion among witnesses testifying at the hearings held following the *Wunderlich* decision was that passage of one of the proposed bills would not result in an overburdening of the courts. While an attorney of the Department of Justice suggested that a "flood of litigation" would result from the legislative overruling of the *Wunderlich* decision (Senate Hearings, p. 16), sharp disagreement with this view was expressed by industry spokesmen and one Congressman who pointed to the relatively few pre-*Wunderlich* cases in the Court of Claims (see Senate Hearings, p. 35; House Hearings, pp. 14, 32, 81, 86, 87–88). If these judgments were incorrect and Congress was acting on an invalid premise in providing for judicial review of agency disputes decisions, only Congress can now alter the legislation. But there is little evidence that the premise was invalid.

The Wunderlich Act itself permits only a limited judicial review of agency decisions. The Court of Claims in reviewing such a decision is not permitted to receive new evidence, but is restricted to deciding whether the agency decision is supported by "substantial evidence" in the administrative record.[20] *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709. Under these circumstances, it is unlikely that either a contractor or the government will go to the expense or trouble to seek review of the vast majority of agency decisions.

Moreover, although the volume of litigation has been substantial, there is no indication that the Court of Claims has been overwhelmed with Wunderlich Act litigation since the enactment of that statute. And the limited number of suits—which for the most part involve attacks by contractors on agency disputes decisions—cannot be attributed to a lack of knowledge on the part of the government that it too can obtain judicial review under the Act. It is now more than 6 years since the Court of Claims explicitly held in *C. J. Langenfelder & Son, Inc.* v. *United States*, 341 F. 2d 600, that the government was entitled to judicial review of agency contract disputes decisions in favor of contractors, and more than two and one-half years since the Attorney General suggested that contracting agencies establish procedures for determining which appeals board decisions might be vulnerable under

[20] The court must also decide whether the agency decision meets the other standards of the Act—*i.e.*, is not "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith * * *." 41 U.S.C. 321.

Wunderlich Act standards. 42 Op. Atty. Gen. No. 33 (January 16, 1969). Petitioner has pointed to no recent flood of government challenges to agency contract disputes decisions. Moreover, the Court of Claims—which presumably is in the best position to gauge the impact upon its docket of permitting the government to litigate under Wunderlich Act standards the validity of agency contract disputes decision in favor of contractors—apparently saw no cause for concern when in the present case it reaffirmed the government's right to do so.

Finally, there is the problem of the delay that judicial review—whether on behalf of a contractor or the government—occasions. It was more than 7 years ago that the Atomic Energy Commission rendered its decision on petitioner's claims, the better part of three of those years having been consumed by GAO's review and petitioner's presentation in connection with that review (App. 1–2; see GAO App., *infra*, p. 43). But it cannot be assumed that all cases in which the government asserts Wunderlich Act defenses will be as time consuming as this one.

With respect to the GAO action, we have already pointed out (see n. 12, *supra*) that petitioner was under no obligation to await completion of the GAO review before commencing this suit in the Court of Claims. Although the proceedings in the Court of Claims culminating in this Court's granting of certiorari have been time consuming—especially in view of the fact that the merits of the government's Wunderlich Act defenses have not yet been considered—it can be anticipated that future cases will proceed more

expeditiously once the complex issues presented herein are settled. In short, judicial review of agency disputes decisions will cause delays; but because of the limited number of cases in which review is likely to be sought and because delays such as have occurred in the instant litigation must be considered to be unusual, it is unlikely that the viability of the disputes process will be impaired.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.[21]

Respectfully submitted.

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[21] Petitioner concedes that, under 41 U.S.C. 322, no finality can attach to questions of law underlying agency disputes decisions (see Pet. Br. 57, 60). As the government in its answer below (App. 11–17) asserted that a number of legal questions were erroneously decided by the Commission, this case should—in the event that our interpretation of the Wunderlich Act with respect to questions of fact is not accepted—be remanded to the Court of Claims for consideration of those questions.

APPENDIX

VIEWS OF THE GENERAL ACCOUNTING OFFICE

[The views of the General Accounting Office on the legality and effect of its consideration of petitioner's contract claims are set forth herein. The Department of Justice, believing that the question of GAO's authority is irrelevant to the resolution of the issues presented by this case (see pp. 24–27, *supra*), expresses no opinion with respect to GAO's views.]

The majority opinion of the court below held that under the plain language of the Wunderlich Act, the government has a right to the same extent as a contractor to seek judicial review of an unfavorable administrative decision on a contract claim. It stated that in the court review it did not matter whether the failure of the agency to pay in accordance with the Board decision resulted from the action of the Comptroller General of the United States or from a change of heart in the agency itself; that in either event, a refusal by the United States to pay a Board award is not a breach of the disputes clause if the award is not supported by substantial evidence or otherwise is not entitled to finality under the Wunderlich Act (App. 48–49). Accordingly, the court ordered the case returned to its trial commissioner for his report and findings under the Wunderlich Act standards on the various contract claims considered in the Atomic Energy Commission's administrative decision. GAO believes that this ruling should be affirmed. However, since the dissenting opinions below and petitioner have made an issue of GAO's participation in this case, GAO believes it necessary to explain the basis for its action.

Very briefly, the facts involving its participation are these.

On March 27, 1964, the general manager of the Commission transmitted to GAO a letter dated March 6, 1964, from a Commission certifying officer requesting an advance decision whether an attached voucher could be certified for payment. The request was made pursuant to 31 U.S.C. 82d, which provides that:

> The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification.

The voucher listed 3 items totaling $32,297.73 for contract work involved in this suit. One of the items, for $8,366.19, represented an amount withheld from petitioner because of the government's possible liability to another contractor due to petitioner's delay under the instant contract. A Commission hearing examiner had previously ruled that such withheld amounts should be paid to petitioner immediately while the amount of certain other allowed claims was being considered. As indicated by the certifying officer in his letter, however, petitioner's non-liability for the $8,366.19 depended upon the propriety of the hearing examiner's allowance of time extensions under petitioner's major claims totaling about $2 million.

Thus, the voucher brought into issue the propriety of the time extensions granted by the examiner on the major claims. In any event, GAO considered it its duty pursuant to the Budget and Accounting Act of 1921,

upon which the Commission's disputes decision was

as amended (specifically, 31 U.S.C. 71, 74 and 82d), to go beyond the voucher items. Therefore, GAO requested and was furnished the administrative report based. Its initial consideration of the record led to certain tentative conclusions which were reduced to writing in a draft decision. A copy of the draft was furnished to petitioner, at its request, in February 1965 for comment and reply. At the same time, copies of the draft were furnished to the contracting officer and the Commission for the same purpose. Replies, in the form of briefs, were received in April 1965 from the contracting officer and in June 1965 from petitioner. In August 1965, the Chairman of the Commission advised GAO that, under the circumstances, he did not believe it would be appropriate or desirable for the Commission to comment on any proposed action by the GAO bearing upon the correctness and conclusiveness of the Commission's decision.

Thereafter, at petitioner's request, conferences were held at GAO on April 15 and April 20, 1966, during which the various issues in the Commission's disputes decision were discussed in detail. At the conclusion of the April 20 conference, petitioner requested that it be allowed to submit an additional brief which would be primarily directed at showing what items in evidence before the hearing examiner would constitute "substantial evidence" in support of the examiner's decision. The request was granted and petitioner submited this additional brief in July 1966.

On December 5, 1966, the Comptroller General issued his decision, B–153841. The decision advised the certifying officer that the voucher could not be certified for payment and, in addition, stated that (46 Comp. Gen. 441, 544).

> On the basis of the entire record in this case, as heretofore discussed in detail, it is our opinion that, in the several vital respects indicated

> herein, the decision rendered by the Hearing Examiner on June 26, 1963, as reviewed by the Commission, fails to meet the requirements of the Wunderlich Act on material questions of fact and is erroneous on several material questions of law, as set out above. We must advise, therefore, that S & E Contractors, Inc., has no valid claim against the Government upon which an equitable adjustment, as ordered by the Examiner and the Commission, may be made. The Atomic Energy Commission will be furnished a copy of this decision and will be advised of our views.

(A detailed report of these facts can be found in the decision beginning at 46 Comp. Gen. 441.)

Petitioner contends that the GAO exceeded its audit authority by undertaking to review petitioner's claims which were not included in the voucher. The GAO decision advising the Commission not to pay petitioner's claims was not, strictly speaking, the actual settlement of an account. The ruling consituted merely an advance notice to the Commission that credit would not be allowed in its disbursing officer's accounts if petitioner's claims were paid administratively in accordance with the Commission's disputes decision. An advance decision does not require an agency head or an accountable officer to take specific action. But if an advance decision is disregarded, there could be a disallowance of any payments made in contravention of the Comptroller General's decision. See *United States ex rel. Brookfield Construction Co.* v. *Stewart*, 234 F. Supp. 94, 100 (D.D.C.), where the court stated:

> As a matter of convenience, the Comptroller General may render advance rulings on questions whether certain payments, if made, would or would not be approved by him, 31 U.S.C. § 74, 3d paragraph. Such a course is conducive to fairness and efficiency. While the statute expressly authorizes the Comptroller General to

> do so, it would seem that even in the absence of an explicit provision such an activity would impliedly be within his function. *Technically a decision of the Comptroller General upon a question so submitted to him, is not a legal opinion, but a ruling or an announcement that if certain payments were made by disbursing officers in the future, they would be passed or disallowed.* The disapproval would be binding and conclusive on the disbursing officer but not upon the person to whom the payment might be made. It would still be open to the latter to contest any claim for refund and interpose any defense that he may have. If the disbursing officer on the basis of the advance ruling of the Comptroller General declines to make a payment, it is open to the claimant to pursue a judicial remedy by way of a suit for money damages either in the Court of Claims or in an appropriate United States District Court, as the case may be * * *. [Emphasis supplied.]

As recognized in the *Brookfield Construction* case, the Office of the Comptroller General was conceived as one which would be vigorously active in protecting the public treasury against illegal expenditures. It is evident from the history of the Budget and Accounting Act of 1921, which created the GAO (42 Stat. 23), that the Comptroller General was intended to use his own initiative to seek out fiscal improprieties and not just stand on the sidelines waiting for problems to be brought to him. Congress obviously did not intend that the government's chief auditor and investigator in financial matters was to act only upon, and to be limited by, the invitation or request of the agency whose accounts were subject to his audit and settlement powers. The GAO finds no evidence in the Budget and Accounting Act or in its legislative history to indicate that GAO's advance decisions under its audit and account settlement powers should be

limited by the manner in which GAO learns of a proposed doubtful payment. Thus, even if the request for a decision under 31 U.S.C. 82d in the instant case had not required GAO to consider the hearing examiner's findings on the major claims, GAO submits that it had full authority to do so. See, *e.g.*, *Northrop Aircraft, Inc.* v. *United States*, 127 F. Supp. 597 (Ct. Cls.), where GAO acted on its own initiative without a request for review by either the contractor or the contracting agency, and the court agreed with GAO's conclusion.

Petitioner contends, however, that the GAO has a very limited function under the Wunderlich Act and that in the instant case it exceeded its authority by purporting to act as a Court of Claims and overturning the administrative decision. It should be clear from the legislative history of the Wunderlich Act that GAO neither sought nor desired to become another Court of Claims in the contract disputes area. It did seek throughout the legislative consideration of the Wunderlich Act to obtain for the government the same right to judicial review that contractors would have. See House Hearings pp. 39, 135; Senate Hearings, p. 12. In order to better assure that such rights by the government could and would be exercised in appropriate instances, GAO felt that its normal settlement and oversight functions under the Budget and Accounting Act should be recognized and not curtailed by the new legislation.

By endowing administrative disputes findings with near absolute finality, this Court's decisions in *United States* v. *Moorman*, 338 U.S. 457, and *United States* v. *Wunderlich*, 342 U.S. 98, severely limited GAO's ability to carry out its statutory responsibilities in regard to contract payments. By letter of December 30, 1953, the Comptroller General sent the House Committee on

the Judiciary a proposed substitute bill which he believed would restore GAO to the position it had before the *Moorman* and *Wunderlich* cases. See House Hearings, p. 136. Except for the words "in any suit now filed or to be filed," the Comptroller General's substitute bill constitutes the present language of the Wunderlich Act. See H. Rep. No. 1380, 83d Cong. 2d Sess., p. 6. Finally, the House report spells out explicitly the legal effect intended by deletion of the reference to GAO in an earlier version of the proposed legislation (*id.* at p. 7):

> The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, *shall apply the standards of review that are granted to the courts under this bill.* At the same time there is no intention of setting up the General Accounting Office as a "court of claims." Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision. [Emphasis supplied.]

For a brief discussion of this history, see *C. J. Langenfelder & Son* v. *United States*, 341 F. 2d 600, 608 (Ct. Cl.).

The GAO never has viewed itself as exercising judicial power in either the contract or any other area. As indicated, it rejected such authority when the Wunderlich legislation was being considered. Rather, as Congress intended, the GAO views itself as an

intervenor whose actions can precipitate judicial review of a contract dispute under the standards of the Wunderlich Act, recognizing always that the Attorney General, who has the final word in matters of litigation, will decide to prosecute or defend any suit resulting from its intervention.

Judge Collins in his dissenting opinion reads the majority opinion as meaning "that the Government, after deciding that its contractor's claim is meritorious, based on a *preponderance* of the evidence presented to it, can then turn around and reject the claim because there is *substantial* evidence (*i.e.*, less than a preponderance) to support the opposite result" (App. 95). The GAO does not agree. Neither the GAO nor the Department of Justice has contended that the Commission decision should be overturned because there is substantial evidence to support the opposite result. Instead, the GAO alleged that there is a lack of substantial evidence to support the Commission decision in favor of the contractor.

Judge Skelton in his dissent cites *James Graham Mfg. Co.* v. *United States*, 91 F. Supp. 715 (N.D. Cal.) as holding that GAO "is without authority to overturn the decision of a contracting officer, a Board or an executive agency, in contract cases involving the standard disputes clause, in the absence of fraud or overreaching" (App. 69–70). The *Graham* case involved a decision of a contracting officer allowing an item of contract cost. There was no disagreement between the contractor and the contracting officer, but GAO challenged the payment in question and the court held that the contracting officer's determination of cost was final under the terms of the contract, absent fraud or overreaching. *United States* v. *Mason & Hanger Co.*, 260 U.S. 323, held to the same effect.

The GAO believes that these cases are inapplicable to the issue at hand. There is a fundamental distinction between the decision of a contracting officer and that of a Board of Contract Appeals—a distinction that explains why the GAO believes that the government is not bound by Board decisions in the same way it is bound by decisions of contracting officers.

Contracting officers have the authority to enter into and administer contracts in behalf of the government and to make determinations and findings with respect thereto. See Atomic Energy Commission Procurement Regulations, 41 CFR 9–1.450; *United States* v. *Corliss Steam-Engine Company*, 91 U.S. 321. In other words, the contracting officer speaks for the government so far as the contractor is concerned. Consequently, when a contracting officer and a contractor enter into a settlement or amendment agreement under a contract, such agreements are binding on the government. *Mason & Hanger* and *Graham, supra.*

Under petitioner's view of the disputes procedure, a Board of Contract Appeals would function as an extension of the contracting officer. Its decision would be binding on the government to the same extent as a contracting officer's decisions. The GAO thinks this view of the Board is incorrect. Boards function as independent tribunals, much like courts. Contracting officers, on the other hand, are expected to represent the government's interests. This distinction between a Board and a contracting officer is important: Boards of Contract Appeals should function as independent adjudicators of contract disputes, with both parties having equal rights to challenge their decisions.

In conclusion, GAO believes that the relevant issue before the Court is not what GAO did, or could do. The issue is whether the petitioner can plead the finality of

the administrative decision without regard to the Wunderlich Act. In effect, GAO believes that petitioner is urging a finality which is specifically prohibited by that act. GAO submits that the case should be returned to the Trial Commissioner as the Court of Claims ordered for his report and findings on the petitioner's claims under Wunderlich Act standards.

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